***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

379

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No. 21,774

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BILL ROBINSON

a/k/a WILLIE E. JOHNSON

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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On Appeal from a Judgment by the United States District Court for the District of Columbia

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court erred in permitting reference to a conviction for petty larceny for impeachment purposes?

2. Whether the verdict of the jury was supported by the evidence?

## TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,774

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BILL ROBINSON

a/k/a WILLIE E. JOHNSON

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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On Appeal from a Judgment by the United States District Court for the District of Columbia

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# BRIEF FOR APPELLANT

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## JURISDICTIONAL STATEMENT

In an indictment filed on February 27, 1967, appellant was charged with forgery and uttering in violation of Title 22 D. C. Code, Sec. 1401 (1967). The first count charged forgery of a Capitol money order; the second count charged uttering the forged Capitol money order; the third count charged forgery of a Nation-Wide money order; and the fourth count charged uttering the forged Nation-Wide money order. Appellant was arrested and on March 23, 1967, he pleaded not guilty to all

counts. At the beginning of the trial on November 1, 1967, the Government dismissed counts one and two. The district court had jurisdiction over the trial pursuant to Title 11 D. C. Code, Sec. 521 (1967).

The jury found appellant guilty on both counts three and four (counts one and two on the special verdict form filed in this case) on November 2, 1967. The trial court committed appellant to the custody of the attorney general or imprisonment for a period of one year to three years on each of the two counts, the sentences to run concurrently, on February 23, 1968. Appellant filed a timely notice of appeal. The trial court authorized appellant to appeal in forma pauperis on March 1, 1968. Jurisdiction over this appeal is conferred on this Court by Title 28 United States Code, Sec. 1291 (1964).

## STATEMENT OF CASE

Phillip Korn testified for the Government that he operated a grocery store in 1964 and 1965 from which he sold Nation-Wide money orders. He stated that money order No. 2572281 had been in his possession and that he did not issue it or sell it. Rather, according to a list which was not introduced into evidence, this money order was "missing" along with 139 other money orders. It was one of a block of 50 consecutively numbered money orders which Mr. Korn referred to as "missing." (Tr. 26-27, 31-32)

Mr. Korn stated that he issued money orders by placing

them in a machine, setting the dollar amount of the money order and then causing the machine to print that amount on the money order. At the same time, the machine automatically printed his agent's number, i.e., the number which identified the issuing source or location. This number (2-563) is printed on the money order which appellant is alleged to have forged and which is Government's Exhibit 1. (Tr. 26, 27, 30)

Appellant's real name is Willie Eugene Johnson. The money order is made out to, and signed by, Willie Eugene Johnson. Appellant is also known in his neighborhood as Bill Robinson because he has lived for a long time in the household of an aunt whose last name is Robinson. (Tr. 108-09)

Appellant testified that he received the money order made out to him from an old friend named Mary Carter and that he had received money orders from her before. The use of money orders was a way of making and repaying loans. Appellant did not recognize the name or address of the person who was listed as the sender of the money order. He assumed that Miss Mary Carter had written that name as well as the remainder of the front of the money order. Appellant tried diligently to locate Miss Carter to testify on his behalf. He was unable to locate her. (Tr. 108-20)

Some time on or around October 29, 1966, appellant took the money order in question to the restaurant owned by Herbert Aiken, endorsed it and received the full face value of the money order ($60). Appellant had worked for Mr. Aiken in the past

and had cashed checks and money orders there on several occasions. (Tr. 39, 108-15) Appellant had no reason to trick Mr Aiken and appellant first learned that he was charged with passing a forged money order after he was arrested. (Tr 110, 114-15)

Approximately two weeks after Mr. Aiken accepted the money order, it was returned with the notation that it would not be paid. (Tr. 41. Gov't. Exh. 1) Mr. Aiken testified that he requested appellant to redeem the money order and that appellant failed to do so. (Tr. 41) However, appellant testified that he attempted to make repayment to Mr. Aiken on several occasions after the arrest but was unable to make contact with Mr. Aiken at the latter's restaurant. (Tr. 115) On cross-examination, appellant maintained:

> Q Mr. Johnson, do you deny that Mr. Aiken ever got in touch with you and asked you about this money order?
>
> A Mr. Aiken never got in touch with me.
>
> Q Do you recall when you attempted to get in touch with Mr. Aiken?
>
> A Yes, sir, many times.
>
> Q When was that?
>
> A Many times. In fact, I was out there not long ago, a couple weeks ago I was out there.
>
> Q Did you ever attempt to make this money order good?
>
> A He was never there. In fact, I went to Mr. Aiken to make it good.
>
> Q On several occasions?
>
> A Yes, sir, and he was never there. [Tr. 120]

Mr. Aiken's testimony is subject to question because he testified that he was at the restaurant on a day when the Government attorney obtained an extension of the trial date on the basis that Mr. Aiken was out of town. The trial court refused to permit defense counsel to develop this point. (Tr. 38, 100-02)

Appellant testified on his own behalf despite the ruling by the trial court that it would permit the Government to impeach appellant's testimony by reference to a conviction for petty larceny. Appellant was the only witness to testify for the defense. Counsel for the defense requested the trial court to exercise its discretion and permit appellant to testify without permitting the Government to make reference to the prior conviction. Defense counsel urged exclusion because appellant must take the stand as the only witness in his behalf and because the conviction of petty larceny appeared peculiarly likely to convince the jury of guilt in a case involving forgery and uttering of money orders. (Tr. 10-14, 102-07)

The trial court refused to permit appellant to testify free of the taint of this prior conviction. Having obtained this ruling before putting his witness on the stand, counsel for the defense still felt compelled to put his only witness on the stand and he was permitted by the trial court to make reference to that conviction on direct examination in order to diminish the effect of these facts upon the jury without

waiving his objection to the ruling. At the time of making the ruling, the trial court had been informed that appellant had only two convictions -- one in 1965 involving receiving stolen property, and one in 1964 involving petty larceny. (Tr. 10-14, 102-07)

The Government's only witness of substance was Mr. James Miller, Chief Question Document Analyst for the Police Department. Despite the fact that Mr. Miller had pursued no studies in handwriting analysis and did not mention handwriting analysis in his description of his job, the trial court ruled that Mr. Miller was qualified as an expert witness in the field of handwriting analysis. (Tr. 56-60) Mr. Miller first testified that the same person signed both the front and the back of Government Exhibit 1. (Appellant admitted endorsing Government Exhibit 1 on the back or reverse side thereof. Tr. 6, 112) Mr. Miller thereafter compared that writing to four known samples of appellant's writing and concluded that the same person wrote all of the samples of writing. (Tr. 67-69) Mr. Miller discussed the differences in slant, length, dots, handling of individual letters, firmness and several other characteristics and purported to find agreement in many instances. (Tr. 69-88) He noted several apparent discrepancies between the writing on the front of Government Exhibit 1 and the known samples of appellant's handwriting and explained these discrepancies as being usual variations or an attempt by the author to make the writing look different. (Tr. 78-87, 92-96)

A portion of the expert's testimony which appellant considers particularly damaging is quoted below:

> I might comment that there is a slight disagreement between the fact of the money order and the back of the money order in that when you first look at it -- and this is to be expected in cases of this type because you have to take into consideration that this money order was payable to a person named Willie Eugene Johnson by another person, Robert J. Johnson, who was supposed to have been the writer and that the endorsement on the back should have been this second person, this should have been the payee, Willie Eugene Johnson, who should not have written on the face.
>
> So normally there should be two different persons. So you expect and you do find in cases of this type where the face and the back are signed by one person, there is some attempt at a different style between the face and the endorsement because the person cashing the money order expects to see a different writing on the face and the endorsement. [Tr. 78]

The Government expert was using Government Exhibit 5 as the focus of his discussion and examination. Government Exhibit 5 is a photographic reproduction of the writing on Government Exhibit 1 and several samples of appellant's known handwriting. Duplicate copies of this exhibit were passed to each member of the jury. (Tr. 62-65) After discussing all of the similarities and the discrepancies at great length, the expert concluded with what appellant considers to be a biased summary:

> Taking all of these things into consideration and not finding any points of disagreement, it was my opinion that Bill Robinson wrote the face of the money order in a fairly close to his normal style with the exception of a slight backhand

> slant and that he wrote very normally and freely the endorsement Willie Eugene Johnson appearing on that money order. [Tr. 87. Emphasis added]

At the close of the Government's case, defense counsel moved for a directed verdict on the dual grounds that the Government had not presented any evidence that the Nation-Wide money order (Government Exhibit 1) was a valid instrument and capable of effecting fraud and also that the Government had not proved any intent to fraud. On this last point the defense noted particularly that the testimony of Phillip Korn regarding the missing documents was not sufficient to show such intent. The trial court overruled the motion for acquittal. (Tr. 98-100) The motion was reviewed and denied before the case was submitted to the jury. (Tr. 136)

The Government introduced no evidence that the money order had been stolen or that the Nation-Wide Company had not in fact received payment for this money order.

## STATUTES INVOLVED

Title 22 D. C. Code, Section 1401 (1967) provides:

§ 22-1401. Forgery

> Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters or publishes, or attempts to pass, utter or publish as true and genuine any paper so falsely made or altered knowing the same to be false or forged with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1326, ch. 854, § 843.)

## STATEMENT OF POINTS

1. The decision of the trial court to permit reference to appellant's previous conviction for petty larceny in 1964 for impeachment purposes was an abuse of discretion because the prejudicial effect on the jury having knowledge of conviction of a crime involving similar intent outweighed the relevance of that conviction to credibility and because appellant had no alternative other than taking the stand in his own behalf.

With respect to Point 1, appellant invites the court's attention to pages 10-14 and 102-07 in the transcript.

2 The verdict was not supported by the evidence because the Government failed to prove that the money order was false or forged, because the Government failed to prove intent to defraud in either count and because the testimony of the Government's expert witness had the prejudicial effect of minimizing the obvious differences between the handwriting on the front of Government Exhibit 1 and the samples of appellant's known handwriting.

With respect to Point 2, appellant invites the court's attention to pages 26-32 56-60. 67-96 and 108-30.

## SUMMARY OF ARGUMENT

Appellant was convicted of forging and uttering a money order. He took the stand as the only witness in his defense after the trial court had refused to exercise his discretion

under the "Luck doctrine" to keep out of evidence any reference to prior convictions. The trial court permitted reference to a conviction for petty larceny (one of appellant's two previous convictions) despite defense counsel's argument that: (1) the jury might infer a propensity to cheat from that conviction which would help them find the crucial intent to defraud in this case; and (2) appellant had to take the stand as the only witness for the defense to tell his story, especially after the trial court had found that the Government had made a prima facie case. The prejudice far outweighed the probative value of the conviction.

The trial court also erred in refusing to direct a verdict of acquittal The verdict of guilty returned by the jury was not supported by the evidence. The Government's witnesses failed to establish that the money order had been forged or was other than validly issued. The Government also failed to show that any person had in fact been defrauded. The Government failed to show intent to defraud and the Government's one witness on this point was not only contradicted by appellant, but his testimony was subject to impeachment if the trial court had permitted it. Finally, the Government's "expert" was not properly qualified and his testimony was biased and misleading. The court should have directed a verdict for appellant either after the close of the Government's case or thereafter.

ARGUMENT

I. The Trial Court Erred in Permitting Reference to the Prior Conviction for Petty Larceny for Impeachment Purposes

The specific intent to defraud is an element of both forgery and uttering. Moreover, knowledge that the instrument was falsely made or altered is an element of uttering. Before the start of the trial and again before beginning the defense, counsel for the defense urged the trial court to exercise his discretion and refuse to permit the Government to make reference to appellant's prior conviction for petty larceny for the purposes of impeachment. Defense counsel argued correctly that the dishonesty or propensity to cheat which might be implicit in a conviction for petty larceny would convince the jury that appellant had the specific intent to defraud necessary to convict for forgery or uttering. Defense counsel also informed the court that appellant would be the only witness for the defense and that defense counsel felt compelled to use appellant as a witness. With the understanding that appellant's record consisted of two convictions, the court ruled that the Government might make reference to the conviction for petty larceny for the purposes of impeachment.*

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*The court permitted defense counsel to bring the fact out on direct examination to lessen the impact, but this variance in form does not affect the substance and the impact of the ruling.

The issue under this section of the argument falls within the area of law governed by the "Luck doctrine." In Luck v. United States, 121 App. D C. 151, 348 F 2d 763 (1965), this Court found that the trial court had discretion under Title 14 D. C Code Section 305 (1961) in permitting the Government to allow the fact of a prior conviction into evidence to affect the credibility of the defendant as a witness. In discussing that discretion, the Court stated:

> There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility.
>
> * * * *
>
> In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. The goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. [Id. at 156-57 348 F.2d at 768-69 ] [Footnotes omitted.]

This Court expanded on the Luck doctrine in Brown v. United States, 125 App. D C. 220, 370 F 2d 242 (1966) where the trial court had exercised its discretion in allowing the

Government to bring the prior convictions into evidence. The Court again stated the two-fold criteria: Whether the prejudice outweighs the relevance to the issue of credibility posed by the prior conviction and whether it would be better to hear the defendant than not. The Court expressed the dilemma in which appellant's trial counsel found himself:

> Thus the impeachment rule confronts the defendant with a dilemma. Although his testimony may provide useful, even critical, information, he must weigh the prejudice that will attend exposure of his criminal record. Too often the defendant is kept from the stand or, having risked impeachment, is clearly prejudiced by admission of his prior record. [Id. at 221-22, 370 F.2d at 243-44.] [Footnotes omitted.]

The trial court was very aware of the similarity between the offense at issue at this trial and the offense of petty larceny for which appellant had been previously convicted. He stated:

> THE COURT: Where the offense involves dishonesty, as I previously stated to you, I think the Gordon case teaches us that the Government, under the Act of Congress in question, should have the opportunity of inquiring into prior convictions involving dishonesty. [Tr. 103]

The court further relied upon Brooke v. United States, 385 F.2d 279 (D.C. Cir. 1967) as permitting the Government to introduce evidence of a conviction for an offense identical to the one at issue because he felt that "jurors are knowledgeable." However, his reliance on Brooke appears misplaced. Although, the trial court had allowed the reference to an identical charge in that case, the real reason for

affirmance was the fact that the defense had another witness other than the defendant to cover the same facts. In this case appellant was the only defense witness.

The gravity of permitting reference to a similar decision is shown by this statement from Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967):

> A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity. [383 F.2d at 940.] [Footnotes omitted. Emphasis added.]

Appellant believes that the trial court below erred in his approach to the question of exercising discretion under the Luck doctrine. Appellant believes that the better reasoning is supported by the following portion of the concurring opinion of Judge McGowan in Blakney v. United States, No. 21231, D.C. Cir., May 2, 1968:

> These facts need only to be recited to suggest what the impact in this case of the jury's knowledge of the robbery conviction might well have been. They speak more eloquently than words of the hollowness of the pretense that juries can and do heed the formal instruction

> that they must regard the prior criminal conviction as relevant only to appellant's propensity to tell the truth rather than to commit crime.
>
> As long ago as 1942, the American Law Institute proposed a Model Code of Evidence which sought to blunt this weapon which prosecutors have--and invariably use. The Commissioners on Uniform State Laws did the same in their 1953 proposal of Uniform Rules of Evidence. It is surely not to be supposed that any group currently engaged in a similar task would do less. Prosecutors today urgently need greatly expanded resources to investigate and present criminal cases effectively. But the legislature should face up to these needs rather than to remain content with cut-rate convictions gotten with the aid of prior criminal records.

This Court has stated that defense counsel had a burden to present fully to the trial court the reasons why the trial court's discretion should be exercised to prohibit introduction of the prior conviction. See Hood v. United States, 125 App. D.C. 16, 365 F.2d 949 (1966). In this instance, counsel for the defendant below met that burden and clearly explained that: (1) appellant had to take the stand in his own behalf as the only witness for the defense; and (2) the prejudicial effect of the knowledge of a conviction for petty larceny on the minds of a jury, searching for the existence of a specific intent to defraud, far outweighed the probative value of the prior conviction on the question of credibility.

This case is one where appellant and his counsel were faced with the cruel dilemma of either presenting no evidence for the defense or allowing the jury to learn of a prior

conviction for petty larceny. Having ruled (in denying the motion for a directed verdict) that the Government had made a prima facie case, the trial court left defense counsel with no choice. Appellant had to take the stand despite the Luck ruling.

Unfortunately, this was not a situation where a prior conviction for petty larceny could be used to impeach the witness being tried for a crime of violence or some other offense where intent to defraud or to cheat was not a major element. This case is analogous to the situation where a prior conviction for petty larceny is admitted for impeachment purposes in a trial involving a charge of petty larceny. The prejudicial effect is obvious. It is unrealistic to assume that the jury did not consider this prior conviction in finding that appellant executed the front side of Government Exhibit 1 and had the requisite intent to defraud. This court must find that the trial court abused its discretion in permitting the prior conviction for petty larceny to be admitted into evidence.

II. The Verdict Rendered by the Jury was Not Supported by the Evidence.

A. The Government did not Prove the Elements of Forgery and Uttering.

In his charge to the jury, the trial court listed the elements of forgery as follows:

> One, that the writing in question was falsely made or altered by the defendant; two, that the defendant so acted with specific intent to defraud; three, that the falsely made or altered writing was apparently capable of effecting a fraud. [Tr. 153]

He also stated the elements of the offense of uttering:

> One, that the writing in question was falsely made or altered; two, that the defendant passed or attempted to pass the writing to someone representing it to be true and genuine; three, that he did so knowing that it was falsely made or altered; four, that he did so with specific intent to defraud; and, five, that the falsely made or altered writing was apparently capable of effecting a fraud. [Tr. 155]

Mr. Phillip Korn testified that the money order which appellant is accused of forging and uttering (Govt. Exh. 1) was one of many documents listed as "missing" on a list which was not put into evidence. He also testified that he did not issue or sell the money order in question. There was no testimony or other evidence that the money order was stolen or illegally procured or issued. Most important, the document itself shows on its face that it was issued by Mr. Korn or by someone with access to the money order stamping machine in Mr. Korn's possession. Neither Mr. Korn or any other Government witness gave any explanation for the critical fact that the money order had been imprinted with Mr. Korn's agent number and appeared on its face to have been issued in the regular course of business.

Moreover, the Government did not introduce any evidence showing that Nation-Wide Check Corporation ("Nation-Wide")

had not received money or payment for the money order in question. There is no explanation for the apparent refusal of the banks or clearing houses to accept the money order other than the explanation which may be inferred, i.e., that this money order was on a list of missing money orders. The Government must show that actions by appellant created a document capable of defrauding Nation-Wide or the person who cashed the money order. This cannot be shown until it is shown that Nation-Wide did not receive $60.00 from someone for this money order.

Mr. Korn's statement that he did not issue the money order simply does not fill in all the gaps in the Government's case. The Government was also required to show: that no agent for Nation-Wide issued the money order; that Nation-Wide did not receive $60.00 for the money order; and that appellant did "issue" the money order. The Government failed to introduce evidence on any of these points.

The Government must have proven each of these facts and failed to prove any. However, appellant wishes to draw this Court's particular attention to the last point: that appellant did not issue the money order. The Government rested its entire case that appellant made a writing capable of defrauding another on its "expert's" testimony that appellant "signed" the front of the money order. Appellant will attack that testimony later, but even if that were proven, it does not show forgery of a <u>money order</u>.

An examination of Government Exhibit 1 is critical. The money order, like a check, has certain important or critical elements; the remainder is irrelevant. The only writings necessary to issue a valid negotiable instrument representing an obligation against the account of Nation-Wide at the National Bank of Maryland are the signature of the president of the promisor or maker (Nation-Wide) and a promise to pay a certain sum to a named individual or to bearer. The signature of the maker is printed on the form. Nation-Wide had issued a valid money order when the agent's number and the amount were stamped on the money order.

If this Court should find, contrary to appellant's arguments, that he wrote his name on the front and so made it payable to him, that act did not constitute forgery. Indeed, the money order would have been valid if the payee's name had been entirely omitted -- the money order then would have been a negotiable bearer instrument. Likewise, if appellant had written the name and address of the person from whom the payment was received, that fact is not relevant and does not make the document work to the prejudice of Nation-Wide or the ultimate recipient. If Nation-Wide was defrauded, it occurred when the agent number and amount were stamped in. The writing on the front which the Government contends is appellant's could have been typed, printed, written by appellant or left blank without changing the nature or effectiveness of the instrument.

The Government did not even attempt to show that appellant stole the money order and in some manner arranged to print the amount and agent number on the front. All other writing on the front is irrelevant to the crime of forgery. ~~For~~ This reason, and the reasoning set forth earlier about the lack of a foundation, clearly show that the Government failed to prove appellant falsely made a document capable of defrauding another with the intent to defraud. If forgery cannot be proved, uttering the same document cannot be proved. Reversal is required.

B. The Testimony of the Expert was Biased and Prejudicial.

Mr. Miller described himself as a "question document analyst" and the trial court incorrectly labeled him a handwriting expert. The basis for such a label was not supported by the evidence in the record. (Tr. 56-60)

Mr. Miller discussed the evidence as if he were assuming guilt. Particularly on pages 67, 78-87, 92-96, he explained the differences between the signature on the front of the money order and the other signatures (see Government Exhibits 1 and 5) either in terms of expected variations or deliberate attempts to make the writing appear to be that of another. The entire testimony appeared very learned and very positive. Average jurors faced with such an array of supposed similarities and a diminishing of

the differences, could not be expected to say independently that appellant did not write both sides of the money order.

This point is pertinent only if this Court fails to accept appellant's earlier argument that his purported action in making the writing on the front of the money order is not relevant. If the Court should find that the authorship of that writing on the front is relevant to the charge of forgery, appellant then contends that the trial court had an obligation to direct a verdict for appellant because of the prejudice of the expert's testimony. Only the trial court had the necessary sophistication and logical training to realize that the Government's position on the handwriting analysis was not nearly so strong as Mr. Miller conveyed. The trial judge's duty in that instance was to protect appellant from the misleading expert.

C. The Trial Court Should Have Permitted Appellant to Impeach the Only Witness On Intent.

Mr. Aiken testified that, before calling the police, he telephoned appellant and requested return of the $60.00 and that appellant failed to do so. Appellant denied this, saying that he first learned of the alleged forgery after he was arrested and that, while awaiting trial on bond, he tried on numerous occasions to pay Mr. Aiken. According to appellant, Mr. Aiken did not call him.

Mr. Aiken's testimony might have been important in the minds of the jurors when they considered the presence of the specific intent to defraud. That intent must be specific and it cannot be inferred from making the forged document. See Frisby v. United States, 38 App. D.C. 22 (1912).

Appellant wanted to impeach Mr. Aiken, who had stated that he was in his restaurant on a certain day. However, the Government had obtained an extension of the trial date due to the fact that Mr. Aiken was out of town. Defense counsel tried to develop this to impeach Mr. Aiken, but the trial court refused with the explanation that such an inquiry would be "collateral." This was erroneous and the proper way to correct the error after the close of testimony was to direct a verdict of acquittal.

In summary, the trial court was ultimately responsible for making sure that the evidence was sufficient to support a verdict of guilty, beyond a reasonable doubt. A preponderance of the evidence is insufficient. See Stevens v. United States, 115 App. D.C. 332, 319 F.2d 733 (1963). The Government simply left too many questions unanswered. The Government did not carry its burden.

## CONCLUSION

Appellant was convicted by a jury of forging and uttering the same document -- a money order. He was the

only witness for the defense and the trial court erred in permitting reference to a prior conviction for petty larceny for impeachment purposes. The trial court also erred in failing to direct a verdict for appellant. The Government failed to establish its case and particularly failed to show that the money order was invalid or had in fact been forged in whole or in any vital aspect.

Respectfully submitted,

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BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,774

BILL ROBINSON, a/k/a WILLIE E. JOHNSON, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia


DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
WILLIAM L. DAVIS,
ROBERT S. BENNETT.
*Assistant United States Attorneys.*


Cr. No. 199-67

## ISSUES PRESENTED

1) Did the trial judge properly exercise his discretion under *Luck* when he ruled that the government could impeach appellant with a prior petit larceny conviction when that conviction was probative on the issue of credibility and when the prejudicial effect of impeachment did not far outweigh the probative relevance of the prior conviction?

2) Did the trial judge properly deny appellant's motions for judgment of acquittal when from the evidence presented a jury could find the appellant guilty of forging and uttering a money order?

## INDEX



## TABLE OF CASES

OTHER REFERENCES



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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,774

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BILL ROBINSON, a/k/a WILLIE E. JOHNSON, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

On February 27, 1967, a four-count indictment was filed charging appellant with Forgery and Uttering in violation of 22 D.C. Code § 1401. The first count charged forgery of a "Capitol" money order; the second count charged uttering the forged "Capitol" money order; the third count charged forgery of a "Nation-Wide" money order; and the fourth count charged uttering the forged "Nation-Wide" money order. On March 23, 1967 the appellant entered a plea of not guilty to all counts. On September 13, 1967 counsel for appellant requested that the court authorize the defense to secure at government

expense the services of an independent handwriting expert. By order filed September 15, 1967 the District Court (J. Bryant) granted appellant's request. On November 1, 1967 the case commenced before the Honorable Oliver Gasch. Prior to the selection of the jury the court and counsel dealt with several preliminary matters (Tr. 1-14)[1] including the following: the government dismissed counts one and two (the forgery and uttering of the Capitol money order) of the indictment (Tr. 3, 14); it was stipulated by the defense that the appellant endorsed with his signature the back of Nation-Wide money order No. 2572281 (Tr. 6, 7); the appellant raised and the court considered the *Luck* question but did not give a final ruling thereon (Tr. 10-14). Upon concluding the preliminary matters the jury was empaneled and the trial proceeded on counts three and four of the indictment (forgery and uttering of the Nation-Wide money order). On November 2, 1967 the jury returned a verdict of guilty on both counts. On February 23, 1968 the court imposed a sentence of one (1) to three (3) years on each count, the sentences to run concurrently. On February 28, 1968 the judgment and commitment were filed. On March 4, 1968 appellant was authorized to appeal in forma pauperis and the notice of appeal was filed.

## The Trial

### *The Government's Case*

The first witness was Phillip Korn. He testified that at the time in question he was the proprietor of Phil's Market located at 301 Twelfth (12th) Street, Southeast, Washington, D. C. In addition to other duties he was an agent for Nation-Wide Money Orders authorized to sell money orders. The identifying agency number given him by Nation-Wide was 2-563. (Tr. 26.) Mr. Korn explained the procedures used in selling money orders as follows:

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[1] Tr. refers to the transcript of the trial in Criminal Number 199-67.

the money orders were issued by a machine which had on it his particular agency number (2-563); the machine automatically printed that number on the orders; he would put the appropriate monetary amount on the money order by stamping it on the machine; the person purchasing the order would pay. (Tr. 29, 30).

Mr. Korn was shown money order Number 2572281 (Government Exhibit 1) and testified that at one time it had been in his possession, that his agency number (2-563) was on it, and that he never sold, transferred, gave away or issued it (Tr. 27, 28). It was further established by his testimony that the money order was one of several money orders which he reported as missing to both the police and Nation-Wide (Tr. 31, 32).

The second witness was Herbert Aiken the owner of Maxie's Restaurant, located at 2417 Good Hope Road, Southeast in the District of Columbia (Tr. 33). Mr. Aiken testified that he knew the appellant since the appellant had worked for him for "a couple of years on and off." Mr. Aiken testified that on the date in question, October 29, 1966 he saw the appellant when he (Mr. Aiken) walked into his place of business. At that time and place the appellant asked Mr. Aiken if he would cash a money order for him. The appellant, according to Mr. Aiken, said his father gave him the money order and he wanted it cashed and he couldn't find any place else to cash it. Mr. Aiken gave him a pen, let him sign it, and cashed it for him. (Tr. 34.) Mr. Aiken identified Government Exhibit 1 as being the money order which he cashed for the appellant in the amount of sixty (60) dollars and which he saw appellant sign on October 29, 1966. He further testified that except for the notations "do not redeposit" and "stop payment" the money order appeared as it did when first presented to him. (Tr. 35.) Mr. Aiken discovered that the money order was "no good" when he got it back from the bank. When Mr. Aiken called the appellant to advise him of this fact, the appellant told him that he would come and straighten it out. Mr. Aiken waited a week and then called him again but was told that appellant had moved. Upon trying to contact the appellant at

the address where he lived at the time he cashed the order. Mr. Aiken was advised that the appellant did not leave a forwarding address (Tr. 41). Mr. Aiken testified that he was in his restaurant almost all the time (Tr. 37, 38, 45).

When Mr. Aiken reported the money order incident to the police he gave them a withholding exemption form with the signature of Willie Eugene Johnson on it (Government Exhibit 2). Mr. Aiken testified that this was written by the appellant in his presence (Tr. 36).

The third and fourth witnesses presented by the government were police officers from the identification section of the police department. Officer Robert H. Puckett identified certain documents (Government Exhibits 3 and 3A) which were signed in his presence by the appellant (Tr. 51). Officer Milton Joseph Sismondo, likewise identified certain documents (Government Exhibits 4 and 4A) which the appellant signed in his presence (Tr. 53, 54). Upon the completion of Officer Sismondo's testimony the government moved and the court received into evidence the Government's Exhibits 1, 2, 3, 3-A, 4 and 4-A previously marked for identification.[2]

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[2] A brief description of all the Government Exhibits received in evidence follow:

*Government Exhibit 1*—Nation-Wide Money Order No. 2572281 made payable to Willie Eugene Johnson from Robert J. Johnson and containing other printed and written entries.

*Government Exhibit 2*—District of Columbia Form D-4—Employee's Withholding Exemption Certificate dated January 17, 1961 and signed Willie Eugene Johnson.

*Government Exhibit 3*—Handwriting specimen—signature of Willie Eugene Johnson.

*Government Exhibit 3A*—Handwriting specimen—signature of Willie Eugene Johnson.

*Government Exhibit 4*—Handwriting specimen—signature of Bill Robinson.

*Government Exhibit 4A*—Handwriting specimen—signature of Bill Robinson.

*Government Exhibit 5*—Enlarged photograph of Government Exhibits 3, 3A, 4, 4A.

*Government Exhibits 5A-5M*—copies of Government Exhibit 5.

The final witness called by the government was James T. Miller, the Chief Question Document Analyst for the police department. After questioning by both government and defense counsel as to his background and qualifications to testify as an expert (Tr. 56-60) the court without any objection from the defense ruled that the witness was "qualified to express an expert opinion in his field of handwriting analysis" (Tr. 60). Mr. Miller testified that he made a comparison of the handwriting on Government Exhibits 1, 2, 3, 3-A, 4 and 4-A (the questioned document and the known handwriting specimens) and as a result of that comparison he concluded that *the appellant wrote the entire face* of and the endorsement on the back of Nation-Wide money order No. 2572281 (Tr. 61, 62, 87). Mr. Miller then testified in detail as to the reasons for his conclusion and the manner in which he arrived at it (Tr. 62-96). At the close of the government's case, the appellant moved for a judgment of acquittal which was denied (Tr. 100). Prior to the defense presenting its case a *Luck* hearing was held out of the presence of the jury. After careful consideration of the applicable cases and pertinent criteria the court ruled that if the appellant took the stand the government could impeach him with a prior 1964 conviction for petit larceny but could not impeach him with a prior 1965 conviction for receiving stolen property (Tr. 102-107; see also Tr. 10-14). Also, the court granted the request of appellant's counsel that the fact of prior conviction be brought out on direct rather than cross-examination (Tr. 107).

***The Defense Case***

The appellant was the only witness on his own behalf. He testified that he received the money order from a lady friend Miss Mary Carter in the latter part of 1966 (Tr. 109). The money order was a loan from Miss Carter (Tr. 117). The appellant admitted that he cashed the money order in Mr. Aiken's restaurant and that he endorsed it on the back with the name Willie Eugene John-

son (Tr. 111, 112, 113, 126). He claimed however that he never filled in anything on the face of the order but assumed that Mary Carter did (Tr. 111, 116, 134). He specifically denied that it was his signature on the front of the order (Tr. 134). As to the signature "Robert J. Johnson", appellant claimed that he did not have any relatives by that name and that he didn't know anyone by that name (Tr. 111, 123). As to the T Street address, appellant testified that he didn't know anyone at that address (Tr. 113). Appellant alleged that he did not notice the names on the face of the money order when he received it (Tr. 111, 112).

The appellant disputed Mr. Aiken's testimony in several respects. He denied that he ever stated that the money order was from his father (Tr. 124). He claimed that Mr. Aiken never called him about the money order (Tr. 114) and that in spite of several attempts on his behalf he was unable to reach Mr. Aiken (Tr. 115). At the conclusion of appellant's testimony the defense rested (Tr. 135). No other witnesses were presented by the defense. Miss Mary Carter was not called as a witness. Moreover, for reasons best known to the appellant he did not call as a witness the handwriting expert whose employment by the defense had been authorized by the court. Appellant renewed his motion for a judgment of acquittal which was denied (Tr. 136).

## STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1401 provides:

> Whoever, with intent to defraud or injury another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years.

Title 14, District of Columbia Code, Section 305 provides:

> No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness, or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

## SUMMARY OF ARGUMENT

### I

The trial judge properly exercised the discretion vested in him under *Luck* and its progeny. The record reflects that the court carefully considered the applicable cases and the pertinent criteria. The prior conviction of petit larceny was probative on the issue of credibility. The probative relevance of this conviction was not far outweighed by its prejudicial effect. The prior conviction was recent and while similar was not the same as the offense on trial. Moreover, the appellant was not kept off the stand. The appellant failed to assist the court in making its determination by rejecting the opportunity to first take the stand out of the presence of the jury. In any event, the prejudicial effect of impeachment was lessened by the court's permitting the defense to bring out the fact of prior conviction on direct examination and by appropriate instructions to the jury.

### II

The trial judge properly denied appellant's motions for judgment of acquittal. The question posed by such a mo-

tion is whether the evidence was such that the jury *could* find guilt beyond a reasonable doubt. The matter of credibility was for the jury and not the court. The testimony presented by the government witnesses and the reasonable inferences therefrom clearly established each and every element of the crimes charged. Moreover, since concurrent sentences were imposed if the evidence was sufficient on either count the appellee must prevail.

## ARGUMENT

### I. The trial judge did not abuse the discretion vested in him when he ruled that the government could impeach appellant with a prior petit larceny conviction.

(Tr. 105, 106, 150)

Appellant contends that he is entitled to a reversal because the trial judge abused the discretion vested in him by *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), when he ruled that the government could impeach the appellant with a prior 1964 petit larceny conviction.

It is clear that the controlling cases do not outlaw the use of prior convictions for impeachment purposes. Under the cases a trial judge has the discretion to bar impeachment with prior convictions 1) when in his judgment the "prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility or 2) when, even if relevant, the "cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction." *Luck* v. *United States*, *supra* at 156, 348 F.2d at 768; *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936, 939 (1967). Appellee submits that there is no basis for concluding that the prejudicial effect of the impeachment allowed here far outweighed its probative relevance to the issue of credibility. Petit larceny has a direct bearing on ones honesty and integrity. *Gordon* v. *United States*, *supra* at 940. Moreover, the

effect of this impeachment was minimized by the fact that it was brought out by the defense on direct examination. It is not unreasonable to imagine a juror thinking "what an honest and straight forward man—he has even told us about his prior record!" Also, the effect was minimized by the court's instruction on just why a prior conviction was admitted (Tr. 150).

The appellant was not kept from the stand because of the court's ruling. It appears that he would have testified irrespective of that ruling (Tr. 106). Moreover, before finally ruling on the *Luck* issue the court stated:

> THE COURT: Mr. Saypol, as I indicated earlier to you, if you wish the defendant at this time to take the stand and testify out of the presence of the jury so the court can give further attention to that, that is perfectly agreeable to the court.
>
> That, too, is suggested in the Gordon opinion that such an opportunity be afforded. (Tr. 106)

This opportunity to assist the court in deciding whether or not to allow impeachment was rejected by appellant. It should be noted that this conviction was relatively recent (1964)[3]—appellant did not live a legally blameless life since that offense—the offense involved stealing which reflects adversely on one's honesty and integrity—it was different from the offense on trial—appellant was not kept off the stand.

Appellant's argument to the contrary is based on the fact that petit larceny is similar to the offense on trial. See, *Brooke* v. *United States*, —— U.S. App. D.C. ——, 385 F.2d 279 (1967). It must again be emphasized that when this argument was raised below the court told appellant's counsel that appellant could take the stand out of the presence of the jury and testify so that the court "can give further attention to that," but this opportunity was rejected (Tr. 105, 106). In any event *Gordon, supra*

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[3] In *Blakney* v. *United States*, D.C. Cir. No. 21,231, decided May 2, 1968, cited by appellant the trial judge allowed the government to impeach the defendant with an eleven year old robbery conviction committed when defendant was eighteen years old (18).

does not bar prior convictions for the same or similar offense but merely instructs that such convictions should be used sparingly.

Where as here the record reflects the diligent and wise exercise of discretion the trial court's action should be affirmed.

**II. The trial judge properly denied appellant's motions for judgment of acquittal because the evidence was sufficient to warrant the verdict of guilty on both counts.**

(Tr. 34, 37-46, 56-62, 87, 111-14, 126, 147-49, 156)

It is well established that a motion for judgment of acquittal should be denied where the evidence, when viewed in the light most favorable to the Government is such that the jury could find guilt beyond a reasonable doubt. The requirement is not that the evidence compel a guilty verdict, only that it is sufficient to permit either a verdict of guilty or not guilty. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332, 334 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). Moreover, when ruling on a motion for judgment of acquittal, the judge does not determine the credibility of witnesses and must take the Government's inculpating evidence as true:

> [T]he credibility of witnesses and the derivation of the truth from oral testimony are reposed in the hearer of the witnesses. Demeanor, inflection and gesture, both on direct examination and under cross-examination are elements in those determinations. Sole witnesses are commonplaces of the courtroom. The jury chooses what to believe and whether the truth thus believed is convincing beyond a reasonable doubt. *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 253, 230 F.2d 220, 221 (1956).

See, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, *supra*.

To constitute the crime of forgery three things must exist: There must be a false making or other alteration of some instrument in writing; there must be a fraudulent intent; and the instrument must be apparently capable of effecting a fraud. *Frisby* v. *United States*, 38 App. D.C. 22, 26 (1912); *Dowling* v. *United States*, 41 App. D.C. 11, 16 (1913); *United States* v. *Briggs*, 54 F.Supp. 731, 733 (D. D.C. 1944). In addition, the crime of uttering requires that the accused pass or attempt to pass the forged instrument to someone representing it to be true and genuine and that he did so knowing that it was falsely made or altered.

The appellee submits that it presented sufficient evidence from which a jury could convict appellant on both forgery and uttering.[4] Let us briefly consider some of that evidence keeping in mind of course the standard with which it must be viewed. *Crawford*, *supra*; *Curley*, *supra*.

There was a false making or other alteration:[5] The

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[4] Since the court imposed concurrent sentences, if the evidence was sufficient on either count the appellee must prevail. *Hirabayashi* v. *United States*, 320 U.S. 81, 85 (1943).

[5] In addition to the entries written by appellant on the face of the money order the appellee submits that the agent's number 2-563 and the amount was also forged. Mr. Korn testified that he did not issue the order and that when one is issued his agency number is automatically printed on it. Accordingly, it is clear that the appellant or some other unauthorized person falsely made the money order by stamping the number and amount on it. The crime of forgery is not limited to the falsification of signatures or writings, it extends to seals, stamps and all other visible marks of distinction by which the truth of any fact is authenticated or the genuineness of any article is warranted. See, *Benson* v. *McMahon*, 127 U.S. 457, 465-471 (1888); see also *United States* v. *Garfinkel*, 285 F.2d 548 (7th Cir. 1960). The appellant argues that "Neither Mr. Korn or any other Government witness gave any explanation for the critical fact that the money order had been imprinted with Mr. Korn's agent number and appeared on its face to have been issued in the regular course of business" (Appellant's Brief, p. 17). Appellee would submit that it should not be penalized on appeal for not going into areas which might have been unfairly prejudicial to the appellant at trial. Had this matter been highlighted at trial by appellant's counsel the appellee would have had the opportunity to make a proffer of evidence.

[Footnote continued on page 12]

uncontradicted testimony of the expert witness Miller established that appellant wrote the entire face of the money order (Tr. 61, 62, 87). Mr. Miller's opinion was explained in detail to the jury (Tr. 62-96). Moreover, the witness was subjected to careful cross-examination by trial counsel both as to his qualifications to testify as an expert (Tr. 59, 60) and his conclusions (Tr. 89-96). Certainly the jury which was free to accept or reject Mr. Miller's testimony could have found that appellant falsely made the money order by filling out its face which included the purported signature of the maker "Robert J. Johnson" and the address "1625 T Street, N.W., Washington, D.C." This evidence was legally sufficient because a false making includes every alteration of or addition to a true instrument. See, *Gilbert* v. *United States*, 370 U.S. 650, 656 (1961); see also, *United States* v. *Nelson*, 273 F.2d 459 (7th Cir. 1960); *United States* v. *DiPietroantonio*, 289 F.2d 122 (2d Cir. 1961); *Castle* v. *United States*, 287 F.2d 657 (5th Cir. 1961). Where a defendant signs the name of a real or fictitious person, with fraudulent intent he is guilty of forgery. *Milton* v. *United States*, 71 U.S. App D.C. 394, 398, 399, 110 F.2d 556, 560, 561 (1940); *Greever* v. *United States*, 116 F.Supp. 755, 756 (D. D.C. 1953).

There was fraudulent intent: It is of course academic that intent, which is a jury question, cannot usually be proven directly but that it may be inferred by a jury from all the surrounding events and circumstances. In addition to the fact that appellant cashed the money order which he forged the jury could have found the following to be probative on intent: The appellant (who was known to Mr. Aiken by the last name Johnson), told him that his father gave him the money order (Tr. 34) so as to lend

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[5] [Continued]

Finally, appellee submits that even if the jury could not infer that appellant forged the agent's number and amount on the order, they had reasonable grounds to believe that appellant had knowledge of that forgery since he himself forged other portions of the order.

support to the forged signature "Robert J. Johnson" as maker; that the appellant forged a phony address—"1625 T Street, N.W., Washington, D.C." (Tr. 114); that appellant failed to "straighten" the matter out as he said he would and after being advised that the money order was no good he moved and left no forwarding address (Tr. 41).

The money order was apparently capable of effecting a fraud: Appellee submits that a mere examination of the money order shows that a jury could so infer. Appellee would observe that the entries written by appellant, which he claims are of no significance, substantially enhanced the possibility of a fraud being effected. Surely a completed money order is more likely to effect a fraud than an incompleted one. This requirement was met because contrary to actual fact this money order purported to be a Nation-Wide Company money order issued on the authority of the Nation-Wide Company, after receipt by its agent of the sum named.

The forged instrument was passed to Mr. Aiken by appellant who represented it to be true and genuine: The jury had a solid basis for so finding since it is clear that appellant gave the money order to Mr. Aiken, endorsed it and received cash for it (Tr. 34, 111, 112, 113, 126).

The appellant knew that the money order was falsely made or altered: Assuming arguendo that appellant did not know that the agent's number and amount were forged this requirement is still met since the appellant had to know of the written entries which he himself forged.[6]

Let us briefly consider the appellant's arguments to the contrary. The principle contention upon which appellant's position rests is the bold allegation that even if appellant falsely made the written entries on the face of the money order he would not be guilty of forgery because those entries had no bearing on the nature or negotiability of the money order (Appellant's Brief p. 19). Appellant cites

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[6] Appellee would submit however that there is a reasonable basis for believing that appellant knew that the agent's number and the amount were forgeries. See footnote 5 *supra*.

no authority for this position. Appellee submits that appellant is confusing civil liability with criminal liability. The criminal statute here involved is a broad one. It is a statute of almost limitless scope. *United States* v. *Briggs*, 54 F.Supp. 731, 732 (D. D.C. 1944). See *Morgan* v. *United States*, 114 U.S. App. D.C. 13, 15, 309 F.2d 234, 236 (1962), *cert. denied* 373 U.S. 917 (1963) *rehearing denied* 374 U.S. 858 (1963). Appellant's suggestion that the forged name and address of the alleged maker is irrelevant because the money order did not thereby work to the prejudice of Nation-Wide or the ultimate recipient is also without merit. It is not an element of forgery that someone actually suffer loss; it is not necessary that someone actually be defrauded nor that the accused have the intent to defraud a particular person. It is sufficient if there is an intent to defraud someone by making or altering a writing which might prejudice another. *Milton* v. *United States*, 71 App. D.C. 394, 399, 110 F.2d 556, 561 (1940); *Easterday* v. *United States*, 53 App. D.C. 387, 390, 292 Fed. 664, 666, *cert. denied*, 263 U.S. 719 (1924); See *Lieberman* v. *United States*, 102 U.S. App. D.C. 310, 253 F.2d 46 (1958). In *Milton*, *supra* the appellant raised an argument similar to the one raised here. There the appellant contended that a false endorsement on a check was not forgery because the check was negotiable without that endorsement. In rejecting this contention the court stated at 110 F.2d 561:

> "It is true that the check, in this case, having been endorsed in blank prior to the time appellant Quantrille received it, might have been negotiated by him without any further endorsement. But it does not follow that the writing of the name James Conroy thereon could not have operated to the prejudice of another. On the contrary, such a result might have been a natural and probable consequence. Not only might such an act have greatly hindered and delayed the person from whom the check was stolen in tracing and recovering it, but subsequent holders, treating the endorsement as genuine and valid, as they

were entitled to do, had the right to rely upon the apparent liability of an additional endorser."

Appellee submits that the very reason appellant made the false entries he did was because he realized that his scheme was more likely to succeed if he passed a completed rather than incompleted money order.

Appellant next contends that in the event this Court finds the falsely made portions of the money order relevant he was still entitled to a judgment of acquittal because the testimony of Mr. Miller was biased and prejudicial and the trial court had a duty to protect the appellant from that testimony. Appellee submits that this is frivolous. Bias is for the jury to consider. Appellant's counsel had full opportunity to examine the witness and the trial court fully instructed the jury on credibility of witnesses which included an instruction on expert witnesses (Tr. 147-149). The defense was satisfied with the instructions (Tr. 156). Moreover, there was a sufficient basis for the trial court allowing Mr. Miller to express an expert opinion (Tr. 56-60). In any event, there was no objection to this finding (Tr. 60). Also, for reasons known best to appellant he did not produce the handwriting expert whose employment by the defense had been authorized.[7]

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[7] Appellant also contends that the trial judge did not permit the impeachment of Mr. Aiken (Appellant's Brief p. 21, 22). This is not supported by the record. The appellant had full opportunity to examine the witness on both cross and recross examination (Tr. 37-46). It was not an abuse of discretion for the trial judge to classify as collateral the matter raised by appellant at pages 100-102 of the transcript especially since the government had already closed its case.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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# REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,774

BILL ROBINSON

a/k/a WILLIE E. JOHNSON

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Judgment by the United States
District Court for the District of Columbia



C. STANLEY DEES

(Attorney for Appellant
Appointed by This Court)

1625 K Street, N. W.
Washington, D. C. 20006

## RESTATEMENT OF QUESTIONS PRESENTED*

1. Whether the trial court erred in permitting reference to a conviction for petty larceny for impeachment purposes?

a. Whether the need for appellant's testimony and the obvious prejudicial affect outweigh the probative relevance of the prior conviction of petty larceny?

b. Whether any reference to prior convictions of a defendant in a criminal trial is a denial of due process and a fair trial and, hence, is unconstitutional?

2. Whether the verdict of the jury was supported by the evidence?

* This Restatement of the issues indicates that appellant is raising a new sub-issue in Question 1 b in this Reply Brief.

## INDEX



## TABLE OF CASES

Authorities chiefly relied upon are marked with an asterisk.

IN THE

UNITED STATES COURT OF APPEALS

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No. 21,774

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BILL ROBINSON

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Appellant,

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On Appeal from a Judgment by the United States District Court for the District of Columbia

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# REPLY BRIEF FOR APPELLANT

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## APPELLEE'S STATEMENT OF THE CASE

The Government's counterstatement of the facts is not complete and omits many material facts. However, it is accurate in all but one important respect. At pages

6, 12 and 13, the Government makes continued reference to the "signature" or the "signature of the maker" on the front of the money order. This reference evades and ignores appellant's argument that the name of the payee and the name and address of the source of the money received by the money order company are not relevant to the effectiveness or negotiability of this instrument. As appellant argued in his opening brief and will argue hereafter, any person can write any name or address on those lines in a money order without prejudicing or affecting the liability of Nation-Wide Check Corporation.

## SUMMARY OF ARGUMENT

In this reply brief, appellant has emphasized two important questions. First, appellant contends that any use of a prior conviction to impeach a defendant in a criminal trial is inherently prejudicial and constitutes a denial of a fair trial in an instance where the defendant did not introduce any affirmative evidence on character or credibility. Either as an extension of the Luck doctrine (further limiting the discretion of the trial court) or as a matter of constitutionally guaranteed due process, this Court must find that the trial court erred in permitting reference to appellant's prior conviction for petty larceny.

Second, this Court must examine the elements of falsely making or altering a money order. That review will show

that appellant did not make or materially alter the money order and that the Government has misconceived the nature of the charge of forgery. Even if appellant did author the handwriting on the front of the money order, putting his own name in as payee is not false and putting another's name and address as the source of the money is legally immaterial.

## ARGUMENT

### I. The Trial Court Erred in Permitting Reference to the Prior Conviction for Petty Larceny for Impeachment Purposes

#### A. The Reference to the Prior Conviction Should Have Been Denied Under the Luck Doctrine Because the Need for Appellant's Testimony was Great and the Prejudicial Affect of the Prior Conviction was also Great.

Appellant believes that this point is thoroughly covered in pages 12-15 of his opening brief. The decisions of this Court in Luck, Brown, Gordon and Blakney* compel the conclusion that where the defendant must take the stand (as the only defense witness to rebut what the court had ruled was a prima facie case) and where the prior conviction is so similar that it will inevitably lead the jurors to

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* Luck v. United States, 121 App. D.C. 151, 348 F.2d 763 (1965); Brown v. United States, 125 App. D.C. 220, 370 F.2d 242 (1966); Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967); Blakney v. United States, No. 21231, D.C. Cir., May 2, 1968.

believe that appellant is guilty and, particularly, that appellant had the requisite fraudulent intent, the trial court must permit the defendant to testify without reference to the prior conviction.

The Government suggests that this Court should affirm the decision of the trial court because appellant took the stand despite the adverse ruling and because appellant refused the trial court's offer to take the stand out of the presence of the jury so that the court could hear that testimony. These two points are related and they fail as an excuse for the trial court's abuse of discretion.

The trial court had ruled that the Government had made a prima facie case and appellant had no alternative to taking the stand as the only defense witness. Certainly, this Court has never suggested that the Luck position is waived if the defendant actually takes the stand. The prejudice of the prior conviction is still there and the object of the Luck doctrine is to avoid the cruel dilemma of choosing silence or prejudice. Moreover, the opportunity to testify out of the presence of the jury, aside from being an unattractive option, would not have been of any assistance to the trial court in making his decision because he already knew (1) that he had ruled that the Government had made a prima facie case, and (2) that appellant would be the only defense witness to rebut that case.

B. Any Reference to Prior Convictions of the Defendant in a Criminal Trial is Unconstitutional Because it Denies a Fair Trial and Due Process.

Appellant here contends that that portion of Title 14, D. C. Code, § 305 (1967) which permits reference to a prior conviction for impeachment purposes is unconstitutional in application to the extent that it permits such reference to the prior convictions of defendant in a criminal trial when the defendant has not introduced "character" evidence.

The law is a changing or living thing. Procedural law, especially in criminal trials, and such areas as the definition of due process and fair trials are in a constant process of evolution. This case presents a conflict between two stages of that evolution. At common law, a person convicted of certain crimes showing depravity or lack of moral character was not competent to testify as a witness in any case. This rule, by process of evolution, has been abolished. However, many of the statutes which confirm that abolition create an exception, as does Title 14, D. C. Code, § 305 (1967), and permit reference to prior convictions to show depraved character by way of impeaching the witness's testimony. See Clawans v. District of Columbia, 62 F.2d 383, 384 (D.C. Cir. 1932). See also Stevens v. United States, 370 F.2d 485, 486 n. 3 (D.C. Cir. 1966), where Judge Fahy said:

> Thus the present Rule in this jurisdiction is a remnant of a discarded Rule rather than a rule which as now applied evolved upon its own merits. (Emphasis added.)

In the process of evolution, persons with prior convictions were permitted to testify but the prior convictions could be introduced for any purpose. This permitted prosecutors in England many years ago to make reference to prior convictions of similar crimes in order to show a propensity to commit the crime. However, as a separate development in the evolution of this area of the law, the courts decided that prior convictions should not be introduced for that purpose.

The Supreme Court explained this development in Michelson v. United States, 335 U.S. 469, 475-76 (1948):

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. [Footnotes omitted]

In one of the footnotes omitted from the preceding quotation, the Court referred to 1 Wigmore, Evidence § 57 (1940). That section contains the following quotation from English jurisprudence at 454:

> 1865, Willes, J., R. v. Rowton, Leigh & C. 520, 540: "[Character evidence] is strictly relevant to the issue; but it is not admissible upon the part of the prosecution because (as my brother Martin says) if the prosecution were allowed to go into such evidence, . . . the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine." Martin, B.: "There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offence charged."

Later at section 194 in the same treatise, Wigmore explains again the reasoning behind the exclusion of testimony concerning bad acts or prior convictions of the defendant:

> It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal -- whether judge or jury -- is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. [p. 646]

* * *

> The reasons thus marshalled in various forms are reducible to three: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he [is a "bad man" and] has escaped unpunished from other offences; both of these represent the principle of Undue Prejudice (post, § 1904); . . . . [p. 650]

This Court has consistently excluded evidence of prior convictions or other evidence inclined to prove a disposition or propensity to commit a crime. The explanation for this exclusion is that the evidence is so inherently prejudicial that its use would deprive the defendant of a fair trial. This principle was summed up recently by this Court in Drew v. United States, 331 F.2d 85, 89-90 (D.C. Cir. 1964):

> It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. [Footnotes omitted]

The exceptions for "some substantial, legitimate purpose" have traditionally been limited to: (1) cases where a prior conviction is one of the elements of the offense or will prove an element (e.g., motive, identity, etc.); (2) cases where the defendant introduces evidence for the purpose

of establishing his good character; and (3) for impeachment where the defendant takes the stand. It is appellant's contention that this last exception has never been a clear exception (but, rather, a "remnant of a discarded rule") and that it has no rational basis. It makes absolutely no sense to exclude evidence of prior convictions as part of the Government's affirmative case but permit the Government to introduce such evidence for the purposes of impeachment when the defendant has not introduced any character testimony. The extreme prejudice which calls for exclusion of the testimony in one case should be equally convincing in requiring exclusion in this case.

One of the most important factors in requiring this Court to adopt this rule is the now admitted fact that the cautionary instruction by the trial court is not understood by the jury. Judges and legal writers now appear unanimous in accepting the fact that a jury cannot departmentalize or distinguish between the relevance of a prior conviction to the issue of credibility and to the issue of guilt or propensity. The overwhelming prejudice which results when the jury believes that the defendant is a "bad guy with a criminal record" cannot be dissipated in any significant measure by the judge's limiting instruction to the jury. See Michelson v. United States, 335 U.S. 469, 484-85 (1948); Stevens v.

United States, 370 F.2d 485, 486 (D.C. Cir. 1966) (Fahy, J., dissenting); Awkard v. United States, 122 App. D.C. 165, 167, 352 F.2d 641, 643, 645-46 (1965); Note, "Procedural Protections of the Criminal Defendant - A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime," 78 Harv. L. Rev. 426, 441 (1964); McCormick, Evidence § 43, at 93 (1954).

In Awkard v. United States, supra, at 484-85, this Court noted that "the jury almost surely cannot comprehend the Judge's limiting instructions." The Harvard Law Review Note refers to jury studies which show that the jury fails to segregate and confine the evidence of prior convictions to the issue of credibility. Rather, such evidence is accepted as an indication that the defendant is a "bad man."

Rule 21 of the Uniform Rules of Evidence provides a practical solution to this problem. The rule recommends that no evidence of prior convictions be permitted for the purposes of impeachment unless the defendant has introduced evidence admissible solely for the purpose of supporting his character or credibility. The authors of the Harvard Law Review Note cited above would go further and prohibit any reference to prior convictions or bad character of a defendant in a criminal trial. This more extreme result is not required in this case. Moreover, the Court is not required to declare the entire statute unconstitutional.

Rather, this Court is required to find that use of prior convictions to impeach a defendant in a criminal trial when the defendant has not presented evidence supporting his character or credibility is so inherently prejudicial as to deny due process.*

The time has now come to carry the abhorrence of using prior convictions to its logical conclusion and to remove the unexamined conflict between the two areas of evolution in the law of criminal procedure which find the use of prior convictions abhorrent if the Government introduces the evidence to prove guilt but permits such introduction if the issue is credibility.** When a jury is absolutely unable to distinguish the purpose for which the evidence is introduced, the distinction is illogical. The "remnant of the discarded rule" must now itself be discarded.

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* If the Court is unwilling to so construe application of 14 D.C. Code § 305 (1967) on constitutional grounds, it may do so in exercise of its supervisory power to order a new trial as it presumably did in the Luck case. See, e.g., Lane v. Warden, 320 F.2d 179, 182 (4th Cir. 1963). The ruling sought can be an extension of the Luck doctrine commanding discretionary exclusion in all criminal cases where the defendant does not present affirmative character or credibility evidence.

** The Court may wish to rule out all references to prior convictions in credibility attacks. Appellant, however, seeks only to exclude such evidence when the defendant in a criminal trial did not put on affirmative character or credibility evidence.

II. The Evidence was not Sufficient to Convict Appellant of the Crime of Forgery

Appellant argued on pages 20-22 of his opening brief that the evidence presented by the Government was not sufficient to support a conclusion that appellant actually wrote the name of the payee or the other written matter on the front of the money order. Moreover, the Government did not prove that appellant had the requisite intent to defraud when he cashed a money order which appeared on its face to have been duly made by the Nation-Wide Check Corporation and which had been delivered to him by a friend as a means of paying a loan. Appellant will not argue those points further in this reply brief.

Appellant objects to the references in the Government's brief to the "purported signature of the maker 'Robert J. Johnson'" and to the further reference to "the forged signature 'Robert J. Johnson' as maker." A cursory glance at the money order which is Government Exhibit 1 should reveal to anyone having a knowledge of negotiable instruments that the name and address of the source of the money (Robert J. Johnson) are immaterial and of no legal erfect. See, e.g., U.C.C. § 3-104. The name and address on the bottom two lines on the left front of the money order are surplusage and in no way constitute a signature or a part of the process of "making"

a promissory instrument. Regardless of whether this information is provided or the lines are left blank, the money order is a valid promissory instrument. Even if appellant added that information, the act does not constitute forgery. See 36 Am. Jur. 2d, Forgery § 15:

> An instrument may be so altered that it is not the instrument signed by the maker, and if this is fraudulently and falsely done, it is forgery. Similarly, if words are added to change the effect of the instrument, with like intent, the crime of forgery is committed. Any change in an instrument which alters its legal effect or makes it speak, in a substantial matter, a different legal language, and wherein any obligation is increased, diminished, or discharged, is a forgery, but any immaterial change which, even if true, will not affect the legal liability of the parties in an action on the instrument does not generally amount to forgery. Nor is it forgery to add mere surplusage, as putting in the name of a witness where no witness is required, or to change a middle initial where such is not deemed to constitute a material part of the name. Similarly, a change in a memorandum upon the back of an instrument, the legal effect of the instrument not being varied, is immaterial. (Emphasis added. Footnotes omitted.)

Moreover, any evidence allegedly showing that appellant wrote the name of the payee (Willie Eugene Johnson) on the first line on the left face of the money order is also irrelevant. Appellant's act (which is denied) in putting his own name on the front of the instrument as payee and his act (admitted) of endorsing that name on the reverse side of the money order do not constitute forgery. This name and the signature were those of the defendant and placing that

information on the money order did not constitute forgery because there is no falseness. See United States v. Greever, 116 F. Supp. 755 (D.D.C. 1953).

Appellee cites the dictum in the case of United States v. Briggs, 54 F. Supp. 731, 732 (D.D.C. 1944), for the unacceptable proposition that the forgery statute involved is a statute of "almost limitless scope." This is clearly contrary to the rules of construction of a criminal statute. The Government also seeks to answer appellant's argument by stating that it is not an element of forgery that someone actually suffer loss. But, as the Government admits, it is necessary that the making or altering of a writing may work to the prejudice of another. As long as the Nation-Wide money order was duly made as a negotiable instrument by an agent of Nation-Wide or someone having possession of the check stamping machine, appellant's alleged act of filling in the name and address of the source of the funds could not work to the prejudice of Nation-Wide.

Appellant's reliance on Milton v. United States, 71 App. D.C. 394, 110 F. 2d 556 (1940), is inapposite. In that case, the Court found that the act of the accused in providing an additional endorsement created additional security and hence might work to the prejudice of another. Nothing that appellant is accused of doing to this money

order can be so characterized.

The question to which this Court should address itself in this area is two-fold. First, has the Government correctly analyzed the alleged crime as forgery. Perhaps appellant or some other person should have been charged with stealing a negotiable instrument. However, appellant did not make or alter that instrument in any material way.

The second and related question is what constitutes forgery of a money order where the promise to pay a sum certain and the signature are impressed upon the instrument by a check making machine. The Government introduced no evidence that Nation-Wide had not in fact made this instrument. The Government cites Mr. Korn's testimony that the latter did not "issue" the instrument. There is no testimony linking appellant or any other person with the act of "making" that instrument. From the record, the applicable charge might just as well have been larceny -- stealing a negotiable instrument. In any event, the Government has not introduced enough evidence to support the charge that appellant or anyone forged the money order which is Government Exhibit 1.

## CONCLUSION

The Summary of Argument in this reply brief capsulizes the arguments which appellant has advanced here. The trial court erred in permitting reference to a prior conviction.

It also erred in failing to recognize that the Government had not established the elements of forgery and, indeed, may have alleged the inapposite crime. For these reasons and the reasons advanced in the opening brief, appellant requests this Court to reverse the decision of the court below.

Respectfully submitted,

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